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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1265

WILLIAM J. FROMBACH, *Petitioner,*

v.

GILBERT ASSOCIATES, INC.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

---

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Inasmuch as the federal question tendered in this case was not timely raised and has in any event long since been foreclosed by this Court, extended or elaborate opposition to the present petition would be inappropriate.

Briefly, after a diversity action brought in the United States District Court for the District of Delaware for personal injuries suffered in Pennsylvania had been dismissed

—because the respondent Delaware corporation had its principal place of business in Pennsylvania, where petitioner also resided, see 28 U.S.C. § 1332(c) as amended in 1958—petitioner then brought the identical action in the Superior Court of the State of Delaware.

By that time, the normal two year Delaware statute of limitations in tort actions had run (10 Del. Code § 8118; Pet. 22), but petitioner sought and obtained in the Superior Court a determination that he was entitled to the benefits of the savings statute (10 Del. Code § 8117(a); Pet. 21-22), which tolls limitations where dismissal does not involve the merits (Pet. 23-26).

Thereafter, under the Delaware practice, the Superior Court certified to the Supreme Court of Delaware three questions relating to the construction of the Delaware statutes of limitations (Pet. 27-30), of which only the first two are now relevant.

The first question (Pet. 29, 31-32) was whether the Delaware Savings Statute (10 Del. Code § 8117(a); Pet. 21-22) was applicable in respect of a tort committed in Pennsylvania, a jurisdiction which has no similar savings provision (Pet. 29). The Supreme Court of Delaware assumed that the answer was Yes (Pet. 34, 37).

The second and decisive question (Pet. 29-30, 32) was whether, assuming survival of the cause of action, the Delaware Borrowing Statute (10 Del. Code § 8120; Pet. 21, 33) barred the action if it arose out of a tort committed in a jurisdiction having a two year limitation without any savings provision.

The Delaware Borrowing Statute provides:

> "Where a cause of action arises outside of this State, an action can not be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing

> an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply."

The parties having conceded that, under the Delaware Borrowing Statute, Pennsylvania law must be looked to as setting the time limit, which is a two year period (Pet. 33-34), the Supreme Court of Delaware decided, purely as a matter of Delaware law, that the Delaware Borrowing Statute barred the action (Pet. 34-36, 37).

Petitioner in his brief in the Supreme Court dealt with the construction of the Delaware Borrowing Statute simply as a matter of State law and statutory construction; he made no contentions under the Constitution of the United States. It was only after decision had gone against him in the highest court of Delaware that he raised Federal constitutional questions in his petition for rehearing—which was denied without opinion (Pet. 38).

We have filed with the Clerk a certified copy of petitioner's brief in the Supreme Court of Delaware and of his petition for rehearing, the terms of which fully substantiate the foregoing.*

Accordingly, for at least two reasons, further review here should be denied.

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* Petitioner concedes, at least inferentially, that he did not raise the Federal question prior to his petition for rehearing in the Supreme Court of Delaware. See Pet. 5, also p. 2 of his Application for Extension of Time within which to file Petition for Writ of Certiorari.

Significantly, the petition for certiorari herein does not comply with this Court's Rule 23(1)(f), which requires that, where review of the judgment of a state court is sought, there be specifically set forth the stage in the proceedings at which the federal questions were raised, and the way in which they were passed upon by the state court, in order to "show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

First. It has long been the settled law of this Court that, where a Federal question is first raised on petition for rehearing in a State court, and where the State court does not then consider the Federal question, there is no basis for review: the Federal question has been raised too late. *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 128, and cases cited; *Hanson* v. *Denckla,* 357 U.S. 235, 243-244. Simply to show that the possibility has not been overlooked, we note that in the present case there is not the slightest intimation that this is a "surprise" situation within the rule of *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673.

Second. But there is here no occasion to fear that the jurisdictional infirmity in the record has deprived petitioner of any substantial rights. To the contrary, even if it be assumed simply for purposes of argument that his Federal question had been timely and properly raised, it would have availed him nothing. For the very point now urged has long since been rejected by this Court.

In *Canadian Northern R. Co.* v. *Eggen,* 252 U.S. 553, there was involved the validity of a Minnesota statute that provided—

> "When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued."

This Court unanimously reversed the Eighth Circuit, which had held that the foregoing provision violated the Privileges and Immunities Clause on the footing that it discriminated against a nonresident plaintiff. This Court, pointing out (252 U.S. 561) that "The discrimination of which he complains could arise only from his own neglect," upheld the statute; Mr. Justice Clarke said (p. 563):

> "The laws of Minnesota gave to the nonresident respondent free access to its courts, for the purpose of

> enforcing any right which he may have had, for a year, —as long a time as was given him for that purpose by the laws under which he chose to live and work,—and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate, and the statute is a valid law."

The *Eggen* case, which is plainly dispositive of the present situation (where, indeed, a period of limitations twice as long was available), has never been qualified here in any way. Accordingly, even if the Supreme Court of Delaware had actually passed upon petitioner's present contention, he could not succeed.

Indeed, having in mind the well settled rule (e.g., *McGowan* v. *Maryland*, 366 U.S. 420, 426) that "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," it is plain that the *Eggen* decision also disposes of all that petitioner has now belatedly adduced under the Equal Protection Clause.

For these reasons it is respectfully submitted that the present petition for a writ of certiorari should be denied.

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